In the Supreme Court of the United States

No. 77 - 499

BOARD OF SUPERVISORS OF HINDS COUNTY, MISSISSIPPI, ET AL.,
Petitioners,

vs.

HENRY J. KIRKSEY, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

REPLY BRIEF OF PETITIONERS

THOMAS H. WATKINS
800 Plaza Building
Post Office Box 650
Jackson, Mississippi 39205
Attorney of Record for Petitioners

Of Counsel:

WATKINS & EAGER
800 Plaza Building
Post Office Box 650
Jackson, Mississippi 39205

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THE PETITION FOR WRIT OF CERTIORARI WAS TIMELY FILED.

Petitioners in accordance with subsection 4 of Rule 24 of the Revised Rules of the Supreme Court of the United States file this their reply brief addressed to an argument first raised in the brief in opposition filed by the Respondents in this cause. Respondents in their brief incorrectly argue that the

Petition for Writ of Certiorari filed in this cause was untimely filed.

The facts showing the timeliness of the filing of the Petition for Writ of Certiorari herein are as follows:

The District Court in Kirksey, et al. v. Board of Supervisors of Hinds County, Mississippi, et al., 402 F.Supp. 658 (S.D. Miss. 1975) adopted the 1973 Board plan for the redistricting of the five supervisors' districts of Hinds County, Mississippi. The Plaintiffs, Kirksey and others, appealed to the United States Court of Appeals, Fifth Circuit. The Fifth Circuit panel opinion affirmed the action of the trial court. Kirksey, et al. v. Board of Supervisors of Hinds Co., Miss., et al., 528 F.2d 536 (5th Cir. 1976). The Fifth Circuit granted the Plaintiffs-Appellants' petition for rehearing en banc. On rehearing en banc, the Court of Appeals, Fifth Circuit, with three Judges dissenting on May 31, 1977, reversed the panel decision. Kirksey, et al. v. Board of Supervisors of Hinds Co., Miss., et al., 554 F.2d 139 (5th Cir. 1977). The Fifth Circuit in a letter from the office of the Clerk dated May 31, 1977, mailed to the counsel for the Board a copy of the Court's decision. This May 31, 1977, letter, a copy of which is attached to this brief as Appendix "A", stated:

> "Enclosed is a copy of the Court's opinion this day rendered in the above case. A judgment has this day been entered in accordance therewith pursuant to Rule 36 of the Federal Rules of Appellate Procedure.
>
> "Rules 39, 40 and 41, F.R.A.P., govern costs, petitions for rehearing

and mandates, respectively. A petition for rehearing must be filed in the Clerk's Office within 14 days from this date. Placing the Petition in the mail on the 14th day will not suffice."

Rule 40 of the Rules of Appellate Procedure provides in part as follows:

> "(a) A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order. The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. . . ."

Within 14 days after May 31, 1977, a Petition for Rehearing en banc On Behalf of Defendants-Appellees was accepted and filed by the Clerk of the Fifth Circuit. The Plaintiffs-Appellants, Respondents herein, themselves recognized the right of the Defendants-Appellees, Petitioners herein, to file their petition for rehearing in a letter to the Court dated June 21, 1977, a copy of which letter is attached to this brief as Appendix "B". In their June 21, 1977, letter the Plaintiffs-Appellants stated: "Since the defendants have filed a petition for rehearing en banc from the en banc decision of the Court in the above-styled case, I am obliged to bring to the attention of the Court the recent decision of the United States Supreme Court in Conner v. v. [sic] Finch. . . ." The Plaintiffs-Appellants asked that copies of their June 21, 1977, letter be distributed to the Judges of

the Court, and at no time did they object in any manner to the filing of the petition for rehearing by the Defendants. On July 22, 1977, the Fifth Circuit entered a Per Curiam decision on the petition for rehearing. A copy of that decision is attached hereto as Appendix "C". The Fifth Circuit therein stated: "IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied." Again no indication was given that either the Court or the Plaintiffs-Appellants considered that the Defendants could not file their petition for rehearing. It is particularly interesting to note that the Fifth Circuit withheld the issuance of the mandate in this case until August 8, 1977. On September 30, 1977, less than ninety days after July 22, 1977, the Petitioners filed their Petition for Writ of Certiorari with the Clerk of this Court. 28 U.S.C. § 2101(c).

On pages 13-4 of the Brief for Respondents in Opposition, the Respondents admit that "[N]ormally the filing of a proper and timely petition for rehearing does toll the running of the time within which to petition for certiorari." As long ago as 1894 and even earlier, the United States Supreme Court in such cases as Northern Pacific Railroad Company v. Holmes, 155 U.S. 137, 15 S.Ct. 28, 39 L.Ed. 99 (1894) stated:

> "It is well settled that if a motion or petition for rehearing is made or presented in season and entertained by the court, the time limited for a writ of error or appeal does not begin to run until the motion or petition is disposed of. Until then the judgment or decree does not take final effect for the purposes of the writ of

> error or appeal. Aspen Min. & Smelt Co. v. Billings, 150 U.S. 31, 36 [37: 986, 988]; Voorhees v. John T. Noye Mfg. Co. 151 U.S. 135 [38: 101]."

155 U.S. at 138, 15 S.Ct. at 29, 39 L.Ed. at 99

Texas Pacific Railway Co. v. Murphy, 111 U.S. 488, 4 S.Ct. 497, 28 L.Ed. 492 (1884); United States v. Ellicott, 223 U.S. 524, 32 S.Ct. 334, 56 L.Ed. 535 (1912); and Citizens' Bank of Michigan City v. Opperman, 249 U.S. 448, 39 S.Ct. 330, 63 L.Ed. 701 (1919).

On page 13 of the Brief for Respondents in Opposition, the Respondents cite Department of Banking v. Pink, 317 U.S. 264, 63 S.Ct. 233, 87 L.Ed. 254 (1942) reh. den. 318 U.S. 802, 63 S.Ct. 850, 87 L.Ed. 1166 (1943). However, the Petitioners submit that the decision in the Pink case, supra, clearly shows that their Petition for Writ of Certiorari was timely filed in the present case. The Supreme Court in Pink, supra, stated:

> "A timely petition for rehearing tolls the running of the three-months period because it operates to suspend the finality of the state court's judgment pending the court's further determination whether the judgment should be modified so as to alter its adjudication of the rights of the parties. . . ."

317 U.S. at 266, 63 S.Ct. at 234, 87 L.Ed. at 256

This Court in Rule 23 of the Revised Rules of the Supreme Court of the United States itself recognizes the above statement of law. Rule 23 1. (b) (ii) provides that the jurisdictional statement in a petitioner's petition for writ of certiorari, in addition to the date of the judgment to be reviewed and the time of its entry, shall show "[t]he date of any order respecting a rehearing". Clearly the filing of a timely petition for rehearing in the Fifth Circuit by the Petitioners herein tolled the running of the ninety day period provided for in 28 U.S.C. section 2101(c). Thus the ninety day period did not begin to run until July 22, 1977, when the Fifth Circuit denied the petition for rehearing.

However, the Respondents in the present case erroneously argue that the petition for rehearing filed by the Petitioners in the Fifth Circuit was "in the nature of a second petition for rehearing which is not authorized by the Federal Rules of Appellate Procedure nor the Local Rules of the Fifth Circuit." The petition for rehearing filed by the Petitioners in the Fifth Circuit was not a second petition for rehearing, but was the first and only petition for rehearing filed by them or anyone else to review the May 31, 1977, decision and judgment of the Fifth Circuit, which for the first time held that the 1973 Board plan would continue in effect an existent denial of access to the political process by blacks in Hinds County.

The cases cited by Respondents are inapplicable to the present case. The Respondents cite F. H. E. Oil Co. v. Commissioner of Internal Revenue, 150 F.2d 857 (5th Cir. 1945). In order to understand the ruling in that case it is necessary to

look back at the former opinions in the case appearing at 147 F.2d 1002 and 149 F.2d 238. The case [147 F.2d 1002] came to the Fifth Circuit on petitions by the taxpayers for review of a decision of the Tax Court of the United States (District of Texas). The Fifth Circuit affirmed the judgment of the Tax Court disallowing the taxpayers certain deductions. The taxpayers then filed a motion for rehearing that was denied [149 F.2d 238]. These same taxpayers then filed yet another motion for rehearing, which the Fifth Circuit held was not provided for by the rules of the court. In comparison with the facts of the present case, it is clear that the petition for rehearing filed by the Petitioners herein in the Fifth Circuit was a first petition for rehearing, not a second or successive petition by the same parties seeking review of the same decision of the court.

The Respondents next cite Sun Oil Company v. Burford, 130 F.2d 10 (5th Cir. 1942). This case like F. H. E. Oil Co. v. Commissioner of Internal Revenue, supra, is distinguishable from the case at bar in that the petition for rehearing in Burford, supra, was a second or successive petition by the same parties seeking review of a single decision of the court. An additional interesting thing to note about the Burford case, supra, is that although the Fifth Circuit announced that their rules did not contemplate a second petition for rehearing, the court allowed the second petition to be filed. The Fifth Circuit in Burford, supra, announced that it had full control over its orders and judgments during the term at which they were rendered and even went so far as to order the mandate that had already been sent down recalled and to proceed to a consideration of the second petition for rehearing on its merits.

The Fifth Circuit in Sun Oil Company v. Burford, supra, cites City of Stuart v. Green, 91 F.2d 603, 605 (5th Cir. 1937) in support of its statement that its rules do not comtemplate a second petition for rehearing. On July 15, 1937, the Fifth Circuit reversed the judgment of the lower court in Green, supra. The Appellee then made an application for rehearing, which was denied on August 13, 1937. Then on September 3, 1937, after the mandate had gone down,the Appellee sought to file another application for rehearing. Thus, it is very clear that when the courts have discussed second petitions for rehearing, they are referring to successive petitions by the same party or parties seeking review of the same decision or judgment of the court. The petition for rehearing filed in the Fifth Circuit by the Petitioners herein was not such a second petition for rehearing, but was a first petition duly authorized by Rule 41 of the Rules of Appellate Procedure as recognized by the Respondents and the Fifth Circuit.

In addition, as noted in the Burford case, supra, the Fifth Circuit had control over its May 31, 1977, judgment during the term at which it was issued. It had the right to and did consider the petition for rehearing on its merits, denying the same on July 22, 1977. In Frieze v. West American Insurance Company, 190 F.2d 381 (8th Cir. 1951) the Eighth Circuit allowed a second petition for rehearing to be filed in order that it might be passed on by the court. In the present case the Fifth Circuit could and did permit the filing of the Petitioners' petition for rehearing and, after considering the merits of the petition for rehearing, denied the petition. As stated by the Supreme Court in Bowman v.

Loperena, 311 U.S. 262, 61 S.Ct. 201, 85 L. Ed. 177 (1940):

> ". . . The filing of an untimely petition for rehearing which is not entertained or considered on its merits, or a motion for leave to file such a petition out of time, if not acted on or if denied by the trial court, cannot operate to extend the time for appeal. But where the court allows the filing and, after considering the merits, denies the petition, the judgment of the court as originally entered does not become final until such denial, and the time for appeal runs from the date thereof. [Emphasis added.]
>
> 311 U.S. at 266, 61 S.Ct. at 203-4, 85 L.Ed. at 180

Thus, even if the Petitioners' petition for rehearing was untimely, which clearly it was not as previously shown, since the Fifth Circuit allowed the filing of the petition for rehearing and, only after considering the merits of the petition, denied the same on July 22, 1977, the judgment did not become final until that date, and the time for filing of the petition for writ of certiorari began to run July 22, 1977.

Respondents further cite Rule 35(c) of the Federal Rules of Appellate Procedure dealing with suggestions for rehearing en banc, which provides that the pendency of a suggestion does not affect the finality of the judgment of the court of appeals or stay the issuance of the mandate. The Respondents incorrectly contend that under

Rule 35(c) the filing of the Petitioners' petition for rehearing did not suspend the finality of the lower court judgment. The Advisory Committee Note to Rule 35 states in part as follows:

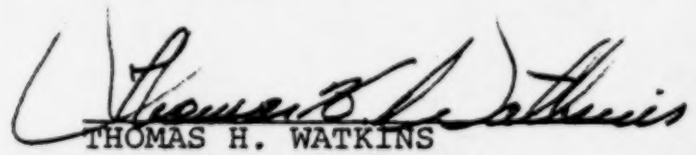
> "In practice, the suggestion of a party that a case be reheard in banc is frequently contained in a petition for rehearing, commonly styled 'petition for rehearing in banc.' Such a petition is in fact merely a petition for a rehearing, with a suggestion that the case be reheard in banc. Since no response to the suggestion, as distinguished from the petition for rehearing, is required, the panel which heard the case may quite properly dispose of the petition without reference to the suggestion. In such a case the fact that no response has been made to the suggestion does not affect the finality of the judgment or the issuance of the mandate, and the final sentence of the rule expressly so provides."

Thus, the pendency of a suggestion does not affect the finality of the judgment of a court of appeals; however, the filing and pendency of a petition for rehearing does affect the finality of such a judgment and tolls the running of the time for the filing of a petition for writ of certiorari. As noted by the Advisory Committee above the document filed by the Petitioners herein in the Fifth Circuit was a petition for rehearing, which did toll the running of time for the filing of a petition for writ of certiorari until July 22, 1977, when the petition for rehearing was denied by the Fifth Circuit.

CONCLUSION

As shown by the foregoing discussion, the petition for writ of certiorari filed in this case by the Petitioners was timely filed. Therefore, the Petitioners again respectfully pray that this Court will review the present case on writ of certiorari.

Respectfully submitted,



THOMAS H. WATKINS
800 Plaza Building
Post Office Box 650
Jackson, Mississippi 39205

ATTORNEY FOR PETITIONERS

Of Counsel:

WATKINS & EAGER
800 Plaza Building
Post Office Box 650
Jackson, Mississippi 39205

CERTIFICATE OF SERVICE

I, the undersigned counsel of record for the Petitioners, hereby certify that on this, the 9th day of November, 1977, three copies of the foregoing Reply Brief of Petitioners were mailed, postage prepaid, to Frank R. Parker, Esquire, Lawyers' Committee for Civil Rights Under the Law, Suite 720, Milner Building, Jackson, Mississippi, 39201, attorney of record for Respondents, and that three copies of said Reply Brief were mailed, postage prepaid, to Jessica Silver, Esquire, Appeals Section, Civil Rights Division, U.S. Department of Justice, Washington, D.C., 20530, attorney for the United States. I further certify that all parties required to be served have been served.

Thomas H. Watkins

THOMAS H. WATKINS

ATTORNEY FOR PETITIONERS

United States Court of Appeals

FIFTH CIRCUIT

EDWARD W. WADSWORTH
CLERK

OFFICE OF THE CLERK

TEL. 504-589-6514
600 CAMP STREET
NEW ORLEANS LA 70130

May 31, 1977

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 75-2212 - KIRKSEY, ET AL. VS. BOARD OF SUPERVISORS OF HINDS COUNTY, MISS., ET AL.

Dear Counsel:

Enclosed is a copy of the Court's opinion this day rendered in the above case. A judgment has this day been entered in accordance therewith pursuant to Rule 36 of the Federal Rules of Appellate Procedure.

Rules 39, 40 and 41, F.R.A.P., govern costs, petitions for rehearing and mandates, respectively. A petition for rehearing must be filed in the Clerk's Office within 14 days from this date. Placing the petition in the mail on the 14th day will not suffice.

Local Rule 15 provides that "A motion for a stay of the issuance of a mandate in a direct criminal appeal filed under F.R.A.P. Rule 41 shall not be granted simply upon request. Unless the petition sets forth good cause for stay or clearly demonstrates that a substantial question is to be presented to the Supreme Court, the motion shall be denied and the mandate thereafter issued forthwith."

If you are court-appointed counsel, your attention is called to Local Rule 7 which provides: "Appointed counsel shall, in the event of affirmance or other decision adverse to the party represented, promptly advise him in writing of his right to seek further review by the filing of a petition for writ of certiorari with the Supreme Court, and shall file such petition, if requested by such party in writing to do so."

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By Ann Barré
Deputy Clerk

enc.

cc: Mr. Frank R. Parker
Mr. Herman Wilson
Ms. Jessica Dunsay Silver
Mr. Thomas H. Watkins
Mr. John M. Putnam
Mr. William Allain

APPENDIX "A"

LAWYERS' COMMITTEE
FOR CIVIL RIGHTS UNDER LAW

SUITE 720 • 210 SOUTH LAMAR STREET • JACKSON, MISSISSIPPI 39205 • PHONE (601) 948-5400

MAILING ADDRESS: P.O. BOX 1971

June 21, 1977

Mr. Edward W. Wadsworth, Clerk
United States Court of Appeals
For the Fifth Circuit
600 Camp Street, Room 102
New Orleans, Louisiana 70130

Re: Kirksey v. Board of Supervisors of Hinds County, Mississippi, No. 75-2212

Dear Mr. Wadsworth:

Since the defendants have filed a petition for rehearing en banc from the en banc decision of the Court in the above-styled case, I am obliged to bring to the attention of the Court the recent decision of the United States Supreme Court in Connor v. v. Finch, 45 U.S.L.W. 4528 (U.S. decided May 31, 1977) (Nos. 76-777, 76-934, 76-935), which has a bearing on and which is entirely consistent with this court's decision in the above-styled case.

As Judge Coleman points out in his separate dissenting opinion in Kirksey, Connor--the Mississippi legislative reapportionment case--also involved the issue of the Hinds County supervisors' districts at issue in Kirksey because those districts were selected by the Connor court as senatorial districts for Hinds County and were challenged by plaintiffs and the United States as plaintiff-intervenor in the Connor appeal as racially discriminatory. The Supreme Court's opinion in Connor was rendered the same day as this Court's opinion in Kirksey, and the United States Supreme Court in its opinion states that the use of the Hinds County supervisors' districts as senatorial districts raises serious questions of "impermissible racial dilution."

In Part III of its opinion, the Supreme Court in Connor specifically cites use of the county supervisors' districts of Hinds County as senatorial districts as one example which raised serious questions of racial gerrymandering in the District Court's state legislative reapportionment plan:

APPENDIX "B"

"To support their claim of impermissible racial dilution,[22] the plaintiffs point to unexplained departures from the neutral guidelines the District Court adopted to govern its formulation of a reapportionment plan-departures which have the apparent effect of scattering Negro voting concentrations among a number of white majority districts. They point in particular to the District Court's failure adequately to explain its adoption of irregularly shaped districts when alternative plans exhibiting contiguity, compactness, and lower or acceptable population variances were at hand. The plaintiffs have referred us to two types of situations in which the District Court's decree fails to meet its own goal that legislative districts be reasonably contiguous and compact: in its subdivisions of large counties whose population entitles them to elect several legislative representatives to both houses, and in its aggregations of smaller counties to put together enough people to elect one legislator.

"Hinds County exemplifies the large county problem.[23] It is the site of the State's largest city, Jackson, and is the most populous Mississippi county, with a total of 214,973 residents, 84,064 of whom are Negroes. As are all Mississippi counties, Hinds is divided into five supervisory districts or "beats"; each beat elects one supervisor to sit on the Board of Supervisors, which is charged with executive and judicial local government

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[22]See, e.g., White v. Regester, 412 U.S. 755; Whitcomb v. Chavis, 403 U.S. 124; Abate v. Mundt, 403 U.S. 182, at 184 n. 2; Burns v. Richardson, 384 U.S. 73, 88-89; Fortson v. Dorsey, 379 U.S. 433, 439.

[23]The textual examples are meant to be illustrative rather than an exhaustive catalogue of possible deficiences in the District Court's plan. Similar criticisms could possibly be made of the districting contours in a number of other counties.

responsibilities. The Board of Supervisors re-apportioned itself in 1969, creating five oddly shaped beats that extend from the far corners of the county in long corridors that fragment the city of Jackson, where much of the Negro population is concentrated. See Kirksey v. Board of Supervisors of Hinds County, 402 F. Supp. 658 (SD Miss.), aff'd 528 F.2d 536 (CA5), rehearing en banc pending, No. 75-2212. The irregular shapes of the beats were assertedly justified as necessary to achieve equalization of road mileage, bridges and land area among the districts, so as to equalize the primary responsibilities of the supervisors-maintenance of the roads and bridges.[24] Whatever may be the validity of those justifications for a Hinds County Board of Supervisors' apportionment first adopted in 1969, they are irrelevant to the problem of apportioning State Senate seats, whose holders will presumably concern themselves with something other than maintaining roads and bridges. The District Court nevertheless concluded that each Hinds County beat should elect one Senator.

"The District Court did not explain its preference for the Hinds County Board of Supervisors' plan, although it did note generally that "we have had to take the Counties, Beats, and [voting] precincts as they actually are." There is, however, no longstanding state policy mandating separate representation of individual beats in the legislature.[25] And there is no practical barrier

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[24]The validity of these justifications for apportionment of the supervisor beats is currently under attack in Kirksey v. Board of Supervisors of Hinds County, supra, pending in the Court of Appeals for the Fifth Circuit after reargument en banc. Our discussion of the Hinds County Senate districting problem is not to be understood as pretermitting that court's consideration of the county supervisor districting issue raised in the Kirksey litigation.

[25]Unlike counties with "boundaries . . . fixed by statute for generations," beats are not units of state government, and their boundaries are frequently changed by the Boards of Supervisors. According to the District Court, "Beat lines generally follow governmental land lines as laid down by section, township, and range-in other words invisible to all and unknown to most. It is a rare individual who knows where a beat line is at any given point. . . ." Connor v. Johnson, 330 F. Supp., at 518.

that requires apportioning a large county on the basis of beat lines; Mississippi's 410 beats are in turn divided into 2,094 voting precincts, each of which is sufficiently small as the basic voting unit to allow considerable flexibility in putting together legislative districts. On this record, neither custom nor practical necessity can thus be said to justify reliance for State senatorial districting purposes upon the beats adopted by the Hinds County Board of Supervisors to govern their own election.

* * *

"Such unexplained departures from the results that might have been expected to flow from the District Court's own neutral guidelines can lead, as they did here, to a charge that the departures are explicable only in terms of a purpose to minimize the voting strength of a minority group. The District Court could have avoided this charge by more carefully abiding by its stated intent of adopting reasonably contiguous and compact districts, and by fully explaining any departures from that goal.

"Twelve years have passed since this litigation began, but there is still no constitutionally permissible apportionment plan for the Mississippi Legislature. It is therefore imperative for the District Court, in drawing up a new plan, to make every effort not only to comply with established constitutional standards, but also to allay suspicions and avoid the creation of concerns that might lead to new constitutional challenges.[26] In view of the serious questions raised concerning the purpose and effect of the present decree's unusually shaped legislative districts in areas with concentrations of

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[26]The District Court did take a substantial step forward in its final decree by eliminating multimember districts. In setting aside this decree we do not mean to obscure the significance of that advance. Although the Court's order to hold special elections in two districts to make more immediately available the fruits of its decree cannot be affirmed in the face of our judgment today that vacates the entire decree, the District Court will retain the power to order such special elections on remand as the circumstances may require or permit.

Negro population, the District Court on remand should either draw legislative districts that are reasonably contiguous and compact, so as to put to rest suspicions that Negro voting strength is being impermissibly diluted, or explain precisely why in a particular instance that goal cannot be accomplished." (45 U.S.L.W. at 4532-33) (Emphasis added.)

I am enclosing 15 copies of this letter for distribution to the Judges of the Court. Thank you for your consideration in this matter.

Yours very truly,

Frank R. Parker

Frank R. Parker
Attorney for Plaintiffs-Appellants

FRP:ljh
Enclosures (15)
cc: Thomas H. Watkins
Attorney for Defendants-Appellees

Jessica Dunsay Silver
Attorney for the United States
as Amicus Curiae

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 75-2212

U. S. COURT OF APPEALS
FILED
OCT 25 1977
EDWARD W. WADSWORTH
CLERK

HENRY J. KIRKSEY, ET AL., Individually, and on behalf of all others similarly situated,

Plaintiff-Appellants,

versus

BOARD OF SUPERVISORS OF HINDS COUNTY, MISSISSIPPI, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Mississippi

ON PETITION FOR REHEARING

(July 22 , 1977)

Before BROWN, Chief Judge, GEWIN, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, MORGAN, CLARK, RONEY, GEE, TJOFLAT and HILL, Circuit Judges.*

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED

ENTERED FOR THE COURT:

United States Circuit Judge

*Because of illness Judges Wisdom and Thornberry did not participate in the hearing or in the consideration of this case.

APPENDIX "C"